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Second Circuit's Expansive Application of Recent Supreme Court Antitrust Jurisprudence Eases Burden on Defendants

In recent years, in cases involving the telecommunications industry, the Supreme Court has narrowed substantially the situations where an alleged monopolist has an obligation to deal with competitors ("*Trinko*")[1] and where allegations of parallel conduct are sufficient to state an antitrust claim ("*Twombley*").[2] There has been considerable speculation as to how broadly the lower federal courts would apply these cases and as to whether any of these decisions would be limited to the highly regulated and complex telecommunications industry.[3] On the day after Labor Day, the United States Court of Appeals for the Second Circuit provided an important partial response in a case with allegations of conspiracy and attempted monopolization involving a firm not in the telecommunications industry by affirming the dismissal of an antitrust complaint.

Plaintiffs in *In re Elevator Antitrust Litigation*[4] represented a putative class of persons who "purchased elevators and/or elevator maintenance and repair services" from sellers of elevators and maintenance service. The complaint alleged:

- price fixing;
- a conspiracy to monopolize the markets for the sale and maintenance of elevators; and
- an attempt to monopolize a unilateral monopolization by each defendant of the maintenance market for its own elevators by making it difficult for independent maintenance companies (and each other) to service each defendant's elevators.

The district court had dismissed the case, and the plaintiffs appealed that dismissal.

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The Second Circuit rejected the plaintiffs' three distinct attempts to surmount *Twombly*, where the Supreme Court had required an allegation of specific facts to provide "plausible grounds to infer an agreement" and "nudge [plaintiffs'] claims across the line from conceivable to plausible."[5] The court found the plaintiffs' general laundry list of participation in meetings, agreement to price fix, rigging bids, exchanging price quotes and allocating markets as "nothing more than a list of theoretical possibilities, which one could postulate without knowing any facts whatsoever."

The plaintiffs' claims of parallel conduct—similarities in contractual language, pricing and equipment design—while more specific, fared no better. As the court stated in language that can help other defendants in the future:

> Similar contract terms can reflect similar bargaining power and commercial goals (not to mention boilerplate); similar contract language can reflect the copying of documents that may not be secret; similar pricing can suggest competition at least as plausibly as it can suggest anticompetitive conspiracy; and similar equipment design can reflect the state of the art.

Finally, the plaintiffs' attempt to bootstrap the initiation of foreign antitrust investigations of the defendants into sufficient facts to survive *Twombly* failed to impress the court, which again found an insufficient factual basis in the plaintiffs' assertions of a worldwide conspiracy backstopped by these investigations to survive the motion to dismiss, particularly where they still lacked a single concrete United States-focused fact.

Trinko was the sword the Second Circuit used to strike down the exclusionary conduct claims. In so doing, the court rejected the arguments that *Trinko* is limited to "pervasive regulatory scheme" situations and also limited *Eastman Kodak Co. v. Image Technical Services*,[6] which held open the prospect of antitrust liability for anticompetitive conduct to freeze out independent services organizations and had not even been cited or distinguished in the *Trinko* opinion.

The Second Circuit characterized *Trinko* as permitting an entity with market power to refuse to deal with a competitor except where "a monopolist seeks to terminate a prior (voluntary) course of dealing with a competitor," citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[7] Conceding that the Supreme Court did not specifically limit its *Kodak* decision to cases where the parties had a prior course of dealing, the Second Circuit nonetheless relied on the fact that *Kodak* "was

decided in that fact context" because Kodak had worked with those independent service organizations for five years. Hence, to the Second Circuit, *Kodak* should be limited as well to situations in which the parties have a history of dealing with each other, citing a similar analysis by the Seventh Circuit.[8]

* * *

The Second Circuit's decision in *Elevator Antitrust Litigation* likely foreshadows where most appellate courts will come out on the broad application of *Twombly* and the narrowing of the *Kodak* decision *sub silentio* by *Trinko*. Antitrust defendants are getting additional ammunition to beat back antitrust complaints at their earliest stages.

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[1] *Verizon Communications v. Trinko,* 540 U.S. 398 (2004).

[2] *Bell Atlantic Corp. v. Twombly,* 127 S.Ct. 1955 (2007).

[3] *See, e.g., Iqbal v. Hasty,* 490 F.3d 143, 155 (2d Cir. 2007) (stating that considerable uncertainty surrounds the breadth of *Twombly*).

[4] No. 06-3128-cv (2d Cir. Sept. 4, 2007).

[5] *Twombly,* 127 S.Ct. at 1965, 1974.

[6] 504 U.S. 451 (1992).

[7] 472 U.S. 585, 601 (1985).

[8] *Schor v. Abbott Labs.,* 457 F.3d 608, 614 (7th Cir. 2006), *cert. denied,* 127 S.Ct. 1257 (2007).

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